(24)

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 401

TONY GRANIERI, BANKRUPT,
PETITIONER,

versus

TONY BLANCHE SCHRAMM, CREDITOR,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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LODOVIC PRINTING CO., SAN ANTONIO, TEXAS

SUBJECT INDEX.

LIST OF AUTHORITIES.

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

I.

STATEMENT OF THE CASE AND THE QUESTION PRESENTED.

The three-year moratorium on petitioner's purchase debt upon his farm expired in June of 1944. At the hearing on its re-valuation, he offered no evidence whatever—not

even his own testimony,—and through means of this appeal he is prolonging indefinitely his tenure of the farm.

Petitioner claims that the question presented, in short, is whether Section 75, Sub-section s(3), of the Bankruptcy Act, authorizes the revaluation of the farm by the original appraisal report of about two years before. This we dispute.

Petitioner fails to explain that such report was admitted in evidence in connection with the testimony of the expert witnesses who made it, towit, Reutzel and Rhode, (R. 38-41, 63-6, 73-8), and their testimony shows an increase in values during the interval of time of between 10% and 25%, (R. 33-4).

Petitioner fails to state that the Commissioner's order shows, in so many words, "that the value of said farm is fixed *in accordance with the evidence submitted* at said hearing, at the sum of $29,950", (R. 3-4), and that the "other pertinent matters" besides "the evidence on value", mentioned in this order as having been heard, logically referred to matters concerning the right of respondent to a hearing (R. 72-3), or else pertain to the time to be allowed for redemption, (R. 79-80, 70-1).

Finally, he fails adequately to inform this Court as to the ample competent evidence supporting the Commissioner's finding on value, as approved by the District Judge and the Circuit Court of Appeals.

The record shows that four well-qualified San Antonio real estate men testified for respondent to values ranging from $28,413 to $33,500, for the farm, including its improvements, (S. F. 16-9, 33-4, 38, 42-6, 51-3, 63-6, 69-70).

In real substance, the question here presented is, when petitioner (farmer-debtor) offered no testimony whatsoever as to the value of his farm, and the respondent (sole creditor) offered substantial and competent testimony supporting the Commissioner's finding thereon, the District

Judge and the Circuit Court of Appeals both affirming, the judgments of all three Courts are "*clearly erroneous.*"

Such a question answers itself.

II.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit appears at pages 83-4 of the record, and its judgment of affirmance at page 84.

In addition, said opinion is reported in 149 F. (2d) 811.

The substance of the decision is found in this sentence, appearing therein:

> "It cannot be said that the finding (on value) is without substantial and competent support in the record." (R. 84).

III.

ARGUMENT.

The Evidence.

The evidence reviewed by petitioner sustains the above quoted holding on the part of the Circuit Court of Appeals (Petition and Brief, 13-7). More specifically, it shows that the witness J. C. Rice gave a value of $5,000.00 to the improvements, and a value of $31,144.00 to the land and improvements together, (R. 36); that the witness Wm. F. Schutz gave a value of $28,500.00 to the land, exclusive of the improvements. (R. 17-8).

It suffices to look to this clear admission found on page 12 of the petition and brief:

> "The *evidence* would have *supported a value finding* ranging from $20,912 *to $33,500.00.*" ($28,500 plus $5,000).

Petitioner's Authorities.

Petitioner repeatedly says that the decision below is in conflict with *Carter vs. Kubler*, 320 U. S. 243, 64 S. Ct. 1; *Moser vs. Mortgage Guaranty Co.*, 123 F. (2d) 423 (C. C. A. 9th); and *Rhodes vs. Federal Land Bank*, 140 F. (2d) 612 (C. C. A. 8th).

In the *Carter case*, supra, it affirmatively appears from the Commissioner's order that "upon a personal investigation of said farm, I hereby fix the value of said farm." Nothing of the kind appears from the Commissioner's order in this case. (R. 3-4).

Similarly, in the *Moser* case, supra, it affirmatively appears from the Commissioner's order that he fixed the value of the farm "from personal knowledge of rent values in the vicinity."

In addition, it appears that the Commissioner combined the two methods of re-valuation, to-wit, a "re-appraisal" and a "hearing", for the purpose of fixing value. The case was reversed on account of these double departures from the statute "in a very material and prejudicial manner".

In the case at bar there was no such combination of two methods of re-valuation, but the sworn original appraisal report was admitted in evidence in connection with the testimony of the witnesses who made such report. There was no evidence outside of the hearing to influence the fixing of the value, and petitioner was accorded full opportunity to cross-examine the witnesses who made the appraisal report.

Again, in the *Rhodes* case, supra, the Commissioner's order affirmatively recites that the value was fixed after taking judicial cognizance of the files, including the appraisal report.

In the case at bar, nothing of the kind appears, and, while the original appraisal report gave the land a value of $25,800, (R. 75), with improvements, the value here fixed was $29,950, and that value appears to have been based, instead, upon the evidence of Schutz and Rice, the two witnesses who did not make such report.

The *Rhodes* case is largely based upon *Rait vs. Federal Land Bank*, 135 F. (2d) 447, from the same Court. In that case it was expressly recognized that the only power had by an appellate court in such matters was to test whether the result reached by the district judge was *clearly erroneous*, citing Rule 52(a).

Admission of Report not "Clearly Erroneous".

In *Equitable Life Assurance Society vs. Deutshele*, 132 F. (2d) 525, (C. C. A. 8th), it was said:

> "It is settled by numerous authorities that when the findings of a referee in bankruptcy are supported by substantial evidence, they are not 'clearly erroneous' within the meaning of General Order 47, 11 U. S. C. A., and they will not be disturbed upon appeal. This is especially true here, as in this case the order appealed from has been approved and confirmed by the District Court."

See also *Equitable Life Assurance Society vs. Carmody*, 131 F. (2d) 318, (C. C. A. 8th).

It has been repeatedly held that an appraiser's report may properly be introduced in evidence as bearing on value, even in the absence of any testimony from the appraisers. *Brockton Savings Bank vs. Shapiro*, 42 N. E. (2d) 828 (Mass.); *Silberman vs. Monroe*, 62 N. W. 555 (Mich.); *Town of Ripton vs. Town of Brandon*, 67 Atl. 541 (Vt.).

The remoteness in time of evidence on value and the qualifications of a witness on value are matters largely

within the discretion of the trial judge, usually going "to the weight of the evidence rather than to its admissibility." *Love vs. United States*, 141 F. (2d) 981, (C. C. A. 8th); *United States vs. Becktold Co.*, 129 F. (2d) 473, 479, (C. C. A. 8th); *Oakland Waterfront Co. vs. Leroy*, 282 F. 385, (C. C. A. 9th); *United States vs. Savannah Shipyards*, 139 F. (2d) 953, 956, 140 F. (2d) 863, 864, (C. C. A. 5th).

Always we come back to the point, in considering the value found by the Commissioner: Why, if it was too high, did not petitioner take the opportunity afforded him to prove that fact?

The answer to this question is found in the clear inference that must be drawn from petitioner's failure to offer any evidence whatsoever—that he could not successfully have combatted the evidence offered by respondent.

Apparently petitioner was not interested in helping the Court to a just decision. His plan instead seems to be to take advantage of the Frazier-Lemke Law, by prolonging indefinitely his tenure of the farm after the expiration in June of 1944 of the three-year moratorium on his debt to respondent.

WHEREFORE, respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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